IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondant, v. MICHAEL LEE WOLFENBERGER, Appellant.	NO. 55305-8-II DECLARATION OF SERVICE PURSUANT TO GR 3.1

I. DECLARATION

I MICHAEL LEE WOLDENBERGER, declares that on 14 July ___, 2022, I invoked the Mailbox Rule (GR 3.1) and deposited the forgoing Appellant's Opening Brief and Declaration of Service, or a copy thereof, scanned into the E-filing system, to the following addresses:

Court of Appeals of the State of Washington, Divison II, 909 A Street, Suite 200, Tacoma, WA 98402

I declare under penalty of perjury under the laws of the State of Washington that the forgoing is true and correct.

DATED this ____ day of July, 2022, at Monroe, Washington

MICHAEL LEE WOLFENBERGER

No. 55305-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE WOLFENBERGER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S OPENING BRIEF

MICHAEL LEE WOLFENBERGER
Pro Se, DOC: 424534
MONROE CORRECTIONAL COMPLEX
TWIN RIVERS UNIT, C-213-1
P.O. BOX 888
MONROE, WA 98272-0888

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Constitutional Provisions

Statutes

Regulations and Rules

Other Authorities

I. INTRODUCTION

Michael Wolfenberger, who was convicted in Pierce County Superior Court and is serving a sentence imposed in that Judgment (Cause No. 18-1-02962-9), respectfully requests that this Honorable Court issue a vacation of the conviction and dismissal of all charges of issue, with prejudice.

Mr. Wolfenberger (DOC: 424534) is currently confined at the Monroe Correctional Complex Twin Rivers Unit in Monroe, WA. He is serving a 67 month sentence, with a variable term of community custody.

On January3, 2022, the Law Offices of Barbara Corey, withdrew from the Appellant's case. Mr. Wolfenberger now seeks relief, through this Appellant's Opening Briefing, Pro se.

This is Wolfenberger's first collateral attack, and is timely filed.

II. ASSIGNMENT(S) OF ERROR

1. The State erred, abused its discretion, and usurped the law, when they sentenced the Appellant to a variable term of community custody, dependant on the amount of earned good time.

2. The State erred, abused its discretion, and usurped the law, when they, in their plea agreement, gave a crime that was not a lesser related of the original crime.

3. The State erred, abused its discretion, and usurped the law, when they failed to establish a credible factual basis, for the original charges.

4. The State erred, abused its discretion, and usurped the law, when they inadequately charged the Appellant with the crime of Commercial Sexual Abuse of a Minor, as part of a "Barr Plea".

5. The State erred, abused its discretion, and usurped the law, when they failed to provide sufficient evidence and failed to prove every essential element, beyond a reasonable doubt, in order to charge the crime of Commercial Sexual Abuse of a Minor.

6. The State erred, abused its discretion, and usurped the law, when they, under the Amended Information, failed to provide essential elements that define all charges to be separate and distinct.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the State allowed to maximize the Appellant's sentence, by means of a variable term of Community Custody in violation of R.C.W. 9.94A.701?
(Assignment of Error 1.)

2. Can the State hold that an Attempted Child Molestation in the Second Degree is of a lesser related crime to that of Attempted Rape of a Child in the Second Degree, based on In Re: Barr, 102 Wn.2d 265, 684 P.2d 712 (1984)?
(Assignment of Error 2.)

3. Is a credible factual basis established, if the Appellant's statement of the facts are not unequivocally stated and are ambiguous in nature?
(Assignment of Error 3.)

4. Can the State introduce the completed crime of Commercial Sexual Abuse of a Minor, as part of an In Re: Barr plea, when there is no originating crime charged, to relate too, and no actual living minor existed?
(Assignment of Error 4.)

5. Can the crime of Commercial Sexual Abuse of a Minor stand as charged, when the referenced minor was, in fact, a fictitous minor created by law enforcement, as part of an undercover sting?
(Assignment of Error 5.)

6. When establishing all the elements of the crimes charged, in the Information and/or Amended Information, does the State bare the burden to prove every essential element, statutory and non-statutory, within the charging document (i.e. Information, or Amended Information) in order for the Information to be sufficient and accurate?
(Assignment of Error 6.)

III. STATEMENT OF THE CASE

On August 31, 2020, Michael Wolfenberger, Appellant, plead guilty to an Amended Information. CP 3. Under this plea agreement, the Appellant plead to One Count of Attempted Child Molestation in the Second Degree, One Count of Communication with a Minor for Immoral Purposes, felony; and One Count of Commercial Sexual Abuse of a Minor. RP 3. These charges arose as part of an undercover sting, where a state patrol officer posed as a 13-year-old minor. RP 10. There was no victim in this case. RP 10.

In the record, the Court imposed a total sentence of 67 months incarceration; 36 months community custody on Counts II and III; and 18 months community custody on Count I. RP 5. The prosecution, imposed a variable term of community custody on Count I, by a handwritten statement:

> "Count I: Actual Term imposed today: 18 months which can increase by earned early release time up to a max of 36 mo." RP 5 & CP 7.

Pursuant the record, the Court only agreed to Count I having 18 months of community custody, not a variable term. RP 15.

In an attempt to obtain a lengthier sentence, the prosecution added Count III, Commercial Sexual Abuse of a Minor - RP 7, and a stipulation that each offense be separate and distinct conduct. CP 3-4. However, these elements were to be in alignment with the Amended Information. CP 3.

Mr. Wolfenberger, who had no prior criminal convictions, stipumated to an offender score of 6, but no specific evidence to support this stipulation was provided. CP 4.

The Appellant provided a factual statement, as part of the plea agreement. RP 6. However, this was not complete or verified, as shown in the record where the prosecution makes the following statement:

> "I think, he did enter a factual plea to that, in part at least." RP 6.

Mr. Wolfenberger was sentenced on October 15, 2020, in asccordance with the plea agreement, plus the additional variable term of community custody. CP 3, 7.

IV. ARGUMENT

> 1. The State erred, abused its discretion, and usurped the law, when they sentenced the Appellant to a variable term of community custody, dependent on earned good time.

As amended under R.C.W. 9.94A.701, a court may no longer sentence an offender to a variable term of community custody, contingent on the amount of earned release time, but instead it must determine the precise length of community custody at the time of sentencing. State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011). During the sentencing hearing, the State inserted a stipulation on Count I, to base the term of community custody on the amount of earned good time, violating his Sixth and Fourteenth Amendments of the U.S. Const. and Art. I § 3, and 22 of the Wash. Const. The proper remedy for a court that renders such a sentence, is to remand for resentencing. State v. Winbonne, 157 Wn.App. 320, 330, 273 P.3d 454 (2012).

> 2. The State erred, abused its discretion, and usurped the law, when they, in their plea agreement, gave a crime that was not a lesser related of the original crime.

The Appellant's right to due process and to a fair and just hearing was violated when he unknowingly entered into an unlawful "Barr Plea." (See In Re: Barr, 102 Wn.2d 265, 684 P.2d 712 (1984)).

Under the elements that outline the basis of a "Barr Plea," the court can agree, that the Appellant entered into a pleaded deal that allowed for a compromised plea agreement, that held no factual basis for the substituted charges, but required the State and Appellant to establish a factual basis for the original charges. In comparison with In Re: Barr, supra, the court should accept that the Aopellant's plea is in fact a "Barr Plea."

It is well settled in the Washington State Supreme Court, that for a

"Barr Plea" to be legal, the accepted crime in the plea must be a lesser related of the original crime. Here, the original Information charged the Appellant with One Count of Rape of a Child in the Second Degree and One Count of Communication with a Minor for Immoral Purposes. It has been established in Barr, that a plea does not become invalid because an accused chooses to plead to a related lesser charge that was not committed in order to avoid certain convictions for a greater offense. See, e.g., People v. Martin, 58 Ill.App.3d 633, 374 N.E.2d 1012 (1978); People v. Johnson, 25 Mich.App. 258, 181 N.W.2d 425 (1970). See generally J. Bond, Plea Bargaining and Guilty Pleas § 3.55(a), (b)(1982).

Here, In Re: Barr, supra, specifically states that the pleaded charges must be a lesser related charge. In the amended charges, the State presented that Attempted Child Molestation in the Second Degree is a lesser related charge to an Attempted Rape of a Child in the Second Degree. This is not true or accurate. What makes this "Barr Plea" inaccurate and unlawful, is that Child Molestation is not a lesser related of the original crime of Attempted Rape of a Child. Child Molestation requires that the offender act for the purpose of sexual gratification, an element not included in Rape of a Child. Rape of a Child requires that penetration or Oral/Genital contact occur, an element not required in Child Molestation. Each requires an element that the other does not. Because, Child Molestation requires an element of sexual gratification, it is not a lesser included offense of Rape of a Child. State v. Saiz, 63 Wn.App. 1, 5, 816 P.2d 93 (1991). Under In Re: Barr, supra, the defendant's original charges were Second Degree Statutory Rape and Third Degree Statutory Rape, and he plead to One Count of Indecent Liberties, by forcible compulsion. When comparing the plea accepted in Barr and the plea accepted by the Appellant, its clear that in Barr, the lesser related charge

of Indecent Liberties contained similar elements of conduct as to the two statutory rape charges; both requiring sexual contact by force. This is a strong contrast to the lesser charges accepted by the Appellant, where the elements are not similar between the plea and that original crimes.

It should be noted, and recommended that the court follow that of the endorsements from other states, and their interpretation of In Re: Barr. Appellate Courts in other states have endorsed similar systems. California and New Mexico Courts have required that the ultimate charge be "reasonably related" to the defendant's conduct, meaning that the defendant "must" plead to the same type of offense as he committed or he "must plead to a lesser included offense. People v. West, 3 Cal.3d 595, 477 P.2d 409, 419-20, 91 Cal.Rptr. 385 (1970); State v. Herrera, 2001-NMCA-73, 131 N.M. 22, 33 P.3d 22, 26. New Mexico has held that factual basis for the original charge is sufficient. Herrera, 33 P.3d at 26.

> 3. The State erred, abused its discretion, and usurped the law, when they failed to establish a credible factual basis, for the original charges.

Since the factual basis requirement, both in case law and in the court's rule is founded on the concept of voluntariness, it holds that a defendant can plea guilty to amended charges for which there is not a factual basis, but "only" if the record establishes that the defendant did so knowingly and voluntarily and that there at least exists a factual basis for the original charge, thereby establishing a factual basis for the plea as a whole. Doing so supports a flexable plea bargaining system through which a defendant can choose to plead guilty to a related charge that was not committed, in order to avoid near certain conviction for a greater offense. See Barr, 102 Wn.2d at 270 (reasoning that a defendant should be able to determine the course of action that he or she believes is in his or her best interest, so long as the defendant's plea is voluntary and intelligent.)

While Barr allows a compromised plea so long as there is sufficient facts to support the original charges, the decisions rendered in In Re: Pers. Rest. of Hews, 108 Wn.2d 579, 741 P.2d 983 (1987)(Hews II), and In Re: Pers. Rest. of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000), the court must engage the defendant in a colloquy regarding the lack of factual basis for the amended charges in order to have a valid plea. State v. Zhao, 157 Wn.2d 188 (2006).

In this case, the Appellant's argument on the facts of illegality of his "In Re: Barr Plea," the Appellant's plea was not supported by the factual basis of the original charges, from a reliable source. Under the Statement for Plea of Guilty, a statement was entered by the defense, however, the statement entered was both (1) insufficient and (2) not written by the Appellant in his own words.

> (1) In order to establish a factual basis, by use of a statement of fact, the Appellant must state unequivocally, a formal and exact presentation of the facts to be entered into the record. To avoid any doubt, the statement must be unambiguous, clear, and free from uncertainty. However, in this case, the Appellant's statement, while making some admittance, displayed an overall uncertain and ambiguous account of the facts.
>
> (2) The statement entered into the Statement of Plea of Guilty, was not of the Appellant's own words, but was a pre-written statement created by the Appellant's counsel. Under the ABA Model Rules, the scope of representation and allocation of authority between client and lawyer, were violated when the Appellant's counsel enforced this statement of fact upon him. Mr. Wolfenberger was denied the ability to speak for himself, on the facts, and was forced to accept the pre-written statement. Persuant to Rule 1.2, of the ABA Model Rules, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

Due process requires that a guilty plea be knowing, voluntary, and intelligent. The Appellant compares his situation with that of Hews, where, "The State argues that Majors and Barr support the trial courts ruling in this case. The State would have us construe that the defendant need not be aware of

the nature of the charges to which he ultimately plead or understand that the facts he admits to constitute that offense....The State's reading of Barr and Majors would render prior decisions in Hews meaningless. Hews held that a plea is not voluntary with in the due process requirements unless the defendant understands the requisite elements of and necessary facts supporting the charge to which he pleads." Hews, 108 Wn.2d 579, 741 P.2d 983 (1987). A plea is not voluntary in the constitutional sense unless the defendant has adequate notice and understanding of the charges against him. Henderson, at 645 & n.13; See also Smith v. O'Grady, 312 U.S. 329, 334, 85 L.Ed. 859, 61 S.Ct. 572 (1941). Understanding of the original charge is not alone sufficient; where the charge encompasses a lesser included offense, the defendant must understand the "essential elements of the charge to which he pleads guilty." McCarthy, at 467 n. 20.

4. The State erred, abused its discretion, and usurped the law, when they inadequately charged the Appellant with the crime of Commercial Sexual Abuse of a Minor, as part of an In Re: Barr Plea.

A "Barr Plea" is clearly defined within case law, where an accused party can choose to plea to a fictitous charge that is of a lesser related offense as that of the original charge, but only if a factual basis can be established by a credible source. The State wrongfully charged the Appellant with One count of Commercial Sexual Abuse of a Minor. According to the evidence provided by the State, no evidence of the essential elements to commit this crime existed. Even under the factual statement given by the Appellant and the State's admittance during sentencing, the accused had no knowledge of offering anything of value for sex and the only purpose for adding this charge was to manipulate the sentencing range, by raising the offender score. This is an outrageous form of misconduct by the State.

With clear proof that there were no original charges to which can be used to base an originating crime, that can be related to a completed Commercial Sexual Abuse of a Minor; the State has committed a manifested error in charging the Appellant with this charge. A "manifested error" is defined as, "an error that is plain and indisputable and that amounts to a complete disregard of the controlling law or the credible evidence in the record." Black's Law Dictionary, Tenth Edition 660 (2014).

> 5. The State erred, abused its discretion, and usurped the law, when they failed to provide sufficient evidence and failed to prove every essential element, beyond a reasonable doubt, in order to charge the crime of Commercial Sexual Abuse of a Minor.

Mr. Wolfenberger challenges the adequacy and sufficiency of the Amended Information as to the charge of Commercial Sexual Abuse of a Minor, found in Count III. An Information must include all essential elements of the crime to be constitutionally sufficient. State v. Pry, No. 96599-4 (Nov. 21, 2019).

SUFFICIENCY OF THE AMENDED INFORMATION

Mr. Wolfenberger contends the facts alleged in Count III of the Amended Information, do not fit within the supporting elements depicted in the Declaration for Determination of Probable Cause. The statutory elements of the crime of Commercial Sexual Abuse of a Minor, found in R.C.W. 9.68A.100(1)(b), do not align with the elements described in the Declaration, because the Declaration does not expressly state that he agreed to pay for sexual relations with a minor. Instead, the Declaration reads that the Appellant simply agreed to get the alleged minor a Slurpee drink, "so the UC officers would know the defendant was at the location they wanted him to go to first." Appellant's contention foes not follow the typical challenge to an Information based on the charging instrument allegedly inadequately describing the crime and thereby failing to give notice. The Appellant instead echoes the argument found in Civil Law that the State failed to state a claim for which relief can be granted.

SUFFICIENCY OF THE EVIDENCE

Appellant next maintains that the charging statute, R.C.W. 9.68A.100(1)(b), requires the State, in Count III, to prove that he offered payment for sexual relations with a **Corporeal** minor. The State submitted evidence only that he agreed to get an inexpensive drink for an invented minor he was meeting, and that the purpose was not for exchanging for sex, but to track the Appellant to an agreed location.

The State failed to provide evidence in support of Count III of the Amended Information, in accordance with R.C.W. 9.68A.100.

> Under R.C.W. 9.68A.100(1)(b): (1) A person is guilty of Commercial Sexual Abuse of a Minor if:....(b) he or she pays or agrees to provide anything of value to a minor or a third person pursuant to an understanding that in return therefore such minor will engage in sexual conduct with him or her. (Emphasis added)

Based on the definitions of "minor" and "persons" found in criminal statutes, based on a comparison of R.C.W. 9.68A.100, with another statute, and based on foreign related decisions, "minor" within R.C.W. 9.68A.100 means a real person. State v. Majeed, 14 Wn.App.2d 868 (2021).

In addition, the State even admits to the fact that the Appellant did not commit the crime of Commercial Sexual Abuse of a Minor, within the Excerpt of Verbatim Report of Proceeding, which can be found in Appendix D.

On page 6, lines 3-8, of this report, the State mentions:

> "...I think, he did enter a factual plea to that, in part at least. I'm not asking the Court to impose that because that was a charge that was added at the end for purposes of the plea and offender score and ranges, and it's not the same as it normally comes before the courts..."

Its clear that the State only added this charge in order to manipulate the Appellant's offender score, in order to maximize the sentencing range. However, even in the factual statement, the Appellant states he had no intentions or knowledge that the "Slurpee" was for an exchange of sexual

relations. Under this motion, the fact that the additional charge plead to by the Appellant, doesn't equate to the essential elements presented in the original charging. The State over stepped its authority when it applied this charge with no evidence to prove such actions were ever completed, nor followed the requirements of Barr. Thus, the Appellant requests that this Court dismiss Count III for insufficient evidence.

6. The State erred, abused its discretion, and usurped the law, when they under the Amended Information, failed to prove essential elements that define all charges to be separate and distinct.

An Information must include all essential elements of the crime to be constitutionally sufficient. State v. Pry, No. 96599-4 (Nov. 21, 2019). The Appellant adds that under the Amended Information, it reads, "...a crime of the same or similar character, and/or a crime based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, and/or so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from others." Based on the ruling under State v. Pry, supra, where the State's notice of the charges, by Information, "shall be plain, concise, and definate written statement of the essential facts instituting the offense charged." CrR 2.1(a)(1). An offense is improperly charged unless the Information set forth every essential statutory and non-statutory element of the crime. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991), State v. Vangerpen, 125 Wn.2d 782, 787, 88 P.2d 1177 (1995). Under the Amended Information, the State failed to provide essential elements that defined the actions of all three charges to be separate and distinct. Instead the State clearly defines each charge as, same criminal conduct. With the introduction of a change in the law, through case law, " an inadequancy of an Information cannot be cured by referring to an attached certificate of probable cause." State v. Pry, supra. "An essential

element is one whose specification is necessary to establish the very illegality of the behavior" charged. State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)(citing United States v. Cina, 699 F.2d 853, 859 (7th Cir. 1983). The primary purpose of the essential element rule is "to apprise the accussed of the charges against him or her and allow the defendant to prepare language of the essential elements of the crime, the Information must do more than merely name the offense and list the elements - it must allege the particular facts supporting them." State v. Nong, 169 Wn.2d 220, 226, 237 P.3d 250 (2010)(citing State v. Leach, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). Failure to allege each element means the Information is insufficient to charge a crime and must be dismissed.

The charges are "same criminal conduct" and not separate and distinct. Being the Appellant has shown that the "Barr Plea" is illegal and will be dismissed, and that the adequacy and sufficiency of the evidence of the Commercial Sexual Abuse of a Minor charge was proven to be lacking and will be dismissed, then all charges have to be dismissed.

V. CONCLUSION

Appellant asks this Honorable Court not to hold him to the standards of an Attorney. Appellant has no legal training and requests liberal interpretation of the law.

The Appellant requests that this Court, due to the variable sentence on the community custody, remand for resentencing to set a determinate amount of community custody. This Court should also hold that under Barr, the Appellant's pleaded charges were not a lesser related offenses to the original, that the State failed to establish a credible factual basis, that the charge of Commercial Sexual Abuse of a Minor was unlawfully charged, and

that the pleaded agreement allows the same criminal conduct to apply to all charges. With the Court ruling as stated above, the Court should vacate Judgment and dismiss all charges for inadequacy and insufficiency of the record.

Respectfully submitted this ____ day of July, 2022.

Michael Lee Wolfenberger
Pro se, DOC# 424534
Monroe Correctional Complex
Twin Rivers Unit, C-213-1
P.O. Box 888
Monroe, WA 98272-0888

INMATE

July 14, 2022 - 3:00 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	55305-8
Appellate Court Case Title:	State of Washington, Respondent v. Michael Lee Wolfenberger, Appellant
Superior Court Case Number:	18-1-02962-9

DOC filing of WOLFENBERGER Inmate DOC Number 424534

The following documents have been uploaded:

- 553058_20220714030003D2169161_1434_InmateFiling.pdf {ts '2022-07-14 14:47:01'}

  The Original File Name was DOC1pMON1071_20220714_144509.pdf

The DOC Facility Name is Monroe Correctional Complex.
The Inmate The Inmate/Filer's Last Name is WOLFENBERGER.
The Inmate DOC Number is 424534.
The CaseNumber is 553058.
The Comment is 1OF1 CORRECT.
The entire orginal email subject is 09,WOLFENBERGER,424534,553058,1OF1 CORRECT.
The email contained the following message:

External Email Warning! This email has originated from outside of the Washington State Courts Network. Do not click links or open attachments unless you recognize the sender, are expecting the email, and know the content is safe. If a link sends you to a website where you are asked to validate using your Account and Password, DO NOT DO SO! Instead, report the incident. Reply to: DOC1pMON1071 <DOC1pMON1071@doc1.wa.gov> Device Name: DOC1pMON1071 Device Model: MX-3070N Location: MCC TRU Law Library Office -SHARP MX-3070N PCL6 File Format: PDF (Medium) Resolution: 300dpi x 300dpi Attached file is scanned image in PDF format. Use Acrobat(R)Reader(R) or Adobe(R)Reader(R) of Adobe Systems Incorporated to view the document. Adobe(R)Reader(R) can be downloaded from the following URL: Adobe, the Adobe logo, Acrobat, the Adobe PDF logo, and Reader are registered trademarks or trademarks of Adobe Systems Incorporated in the United States and other countries. https://smex-ctp.trendmicro.com:443/wis/clicktime/v1/query?url=http%3a%2f%2fwww.adobe.com&umid=849f2c07-9352-4f8e-923c-d55dfcdda4f6&auth=c302d29ff7906effa60127fd92782ca6bfab614f-bfe5d0ac15d7e82b8303745a9246c8913dbed5f0

The following email addresses also received a copy of this email:

A copy of the uploaded files will be sent to:
- kristie.barham@piercecountywa.gov
- PCpatcecf@piercecountywa.gov

Note: The Filing Id is 20220714030003D2169161